No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

REPLY BRIEF FOR PETITIONER

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December 13, 2018

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REPLY BRIEF

The 1868 Treaty between the United States and the Crow Tribe provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." That text does not identify Wyoming's statehood as an event that terminates the hunting right. Likewise, Wyoming's 1890 Statehood Act evinces no congressional intent to terminate the right. And neither law nor logic supports the counterintuitive proposition that the Tribe's hunting grounds ceased to be "unoccupied" simply because President Cleveland in 1897 declared those lands to be the Bighorn National Forest—in a proclamation prohibiting "entry or settlement," no less. In short, as both the United States and the Crow Tribe agree, Petitioner's hunting right survived Wyoming's admission to the Union and the establishment of the Bighorn National Forest.

Wyoming does not—and could not—claim that its statehood was an *express* ground for terminating the treaty right. Instead, Wyoming suggests that statehood marked the culmination of the "march of advancing civilization," which eradicated the Tribe's hunting districts and terminated the right. But Wyoming falls well short of showing that the relevant lands were "occupied" within the meaning of the Treaty; accordingly, its argument is merely a repackaged way of saying that statehood *impliedly* repealed the hunting right. This Court has made absolutely clear, however, that "[t]reaty rights are not impliedly terminated upon statehood." *Minnesota v.*

Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).

As for the creation of the Bighorn National Forest, Wyoming offers no evidence that the Tribe would have understood that its hunting grounds had become "occupied" as the result of a legal decree *prohibiting* settlement. Rather, Wyoming retreats to an array of meritless arguments that, taken individually or collectively, do nothing to demonstrate elimination of the Tribe's treaty right.

Wyoming spends most of its energy pressing an issue preclusion theory that it never raised at Petitioner's criminal trial. But the centerpiece of Wyoming's preclusion argument—a prior determination that Wyoming's statehood terminated the Tribe's hunting right, *see Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995)—has been thoroughly undermined by *Mille Lacs*, which changed the legal context governing Indian treaty rights and thus deprives *Repsis* of its preclusive force. Faced with that obstacle, Wyoming first advances an implausible reading of *Mille Lacs* and then misconstrues this Court's cases in an effort to deny the very existence of the changed-legal-context exception to preclusion. The bottom line is that there is no justification—under principles of issue preclusion or otherwise—for affirming Petitioner's conviction and interring a 150-year-old federal treaty right. To the contrary, if the text of Indian treaties means anything, the Court must reverse.

I. The Crow Tribe's Hunting Right Under The 1868 Treaty Has Not Been Terminated.

A. Wyoming's Admission to the Union Did Not Terminate the Treaty Right.

This Court repeatedly emphasized in *Mille Lacs* that Indian treaty rights "are not impliedly terminated upon statehood." 526 U.S. at 207; *see also id.* at 205, 207. That decision forecloses any contention that Wyoming's statehood brought the Tribe's hunting right to an end. The 1868 Treaty "defines the circumstances under which the right[] would terminate," *id.* at 207, and none of those circumstances includes statehood. Nor did Congress "clearly express its intent" to abrogate the hunting right in Wyoming's Statehood Act. *Id.* at 202. Thus, the only way Wyoming's statehood could have abrogated the Tribe's hunting right is by implication, which *Mille Lacs* rejects. Pet.Br.23-26.

Wyoming all but ignores *Mille Lacs* when addressing the merits.[1] For example, citing *Ward v. Race Horse*, 163 U.S. 504 (1896), Wyoming maintains that the hunting right was a "temporary right not intended to survive Wyoming's statehood," Resp.Br.20, and it argues that this Court "should adopt" *Race Horse*'s "conclusion that [the] 'temporary and precarious' off-reservation hunting right has expired," Resp.Br.55. But *Mille Lacs* rejected "the 'temporary and precarious' language in *Race Horse*" as

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[1] As it did in opposing certiorari, Wyoming claims there is insufficient record evidence to address the merits. Resp.Br.3. But as the court below recognized, whether the Tribe's hunting right has terminated is a pure "question[] of law." Pet.App.9; *see* Pet.Cert.Reply.Br.11-12.

"too broad to be useful in distinguishing rights that survive statehood from those that do not." 526 U.S. at 206. Instead, courts should examine the "fixed termination point[s]" in the text that the parties "clearly contemplated" as extinguishing reserved rights. *Id.* at 207. Examining the *Race Horse* treaty—which is materially identical to the Treaty here—*Mille Lacs* explained that the "right[] would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* *Mille Lacs* did *not* identify Wyoming's statehood as a rights-terminating event when analyzing the *Race Horse* treaty, which is precisely why it declared that reserved treaty rights cannot "be extinguished by *implication* at statehood." *Id.* That emphatic pronouncement would have been completely unnecessary if the *Race Horse* treaty "clearly contemplated" statehood as a rights-terminating event. Consequently, Wyoming's statehood is not a rights-terminating event here.

Wyoming tries to get around this seemingly insurmountable problem by suggesting that its statehood was an indication that the "lands of the United States" were no longer "unoccupied." This cumbersome theory turns on the idea that the reference to "hunting districts" in the 1868 Treaty was meant to encompass "wilderness" that had not experienced the "march of advancing civilization." Resp.Br.43.[2] In Wyoming's view, its grant of statehood in 1890 reflected "congressional recognition" that

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[2] Wyoming borrows this language from *Race Horse*, which elaborated that the "wilderness" where the Indians lived was "destined to be occupied and settled by the white man." 163 U.S. at 508-09.

"civilization [had] arrived," thereby terminating the treaty right. Resp.Br.48.

This novel argument suffers from multiple flaws. To start, the assertions underlying Wyoming's claim of "civilization"—including that the "buffalo were gone," Crow members were prevented from freely leaving their reservation, and the Crow "ceased off-reservation hunting," Resp.Br.47—are dubious, or irrelevant, or both.[3] Furthermore, despite invoking "congressional recognition" that "civilization arrive[s]" upon statehood, Wyoming does not actually identify any such "congressional recognition"—presumably because the notion that territories are lawless dystopias until statehood, but fully mature polities immediately thereafter, is as far-fetched as it sounds.

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[3] For one, Wyoming disregards that the Crow hunted other game besides buffalo. *See* Resp.Br.7; Pet.Br.7. For another, the supposed "deposition testimony ... that the Tribe stopped all off-reservation hunting by 1886," Resp.Br.9, is actually one page in a brief and a "chronological listing of Crow tribal events" asserting (without support) that "year-round" off-reservation hunting ended in 1886, not that *all* off-reservation hunting ended. *See* J.A.376, 387, 476, 485, *Repsis*, No. 94-8097 (10th Cir. Feb. 14, 1995). Indeed, Wyoming argues that Crow Tribe members were prosecuted for "poaching" *after* 1886, indicating that off-reservation hunting continued. Resp.Br.9-10; *see* Pet.Br.10 n.6 (noting 1972 prosecution). Moreover, given that Tribe members "could be jailed" for leaving the reservation, Resp.Br.10, and white settlers literally got away with "murder[ing]" off-reservation Tribe members, Frederick E. Hoxie, *Parading Through History: The Making of the Crow Nation in America 1805-1935* 113 (1995), it is unsurprising that the Tribe might have reduced off-reservation hunting during that period. Hostility toward the Tribe, however—official or private—does not diminish the treaty right.

Additionally, as Wyoming seemingly acknowledges, its theory requires ascribing to the Tribe the belief that "occupied" lands within the meaning of the 1868 Treaty included lands without any "physical presence." Resp.Br.49-53. But the overwhelming textual and historical evidence demonstrates that the Tribe and the United States understood the distinction between "unoccupied" and "occupied" lands to be a common-sense one turning on the actual, physical presence of non-Indian settlers. Pet.Br.33-36.

Wyoming barely addresses this evidence. Instead, it contends that because the Treaty "'set apart'" approximately eight million acres for the Tribe's "'undisturbed use and occupation,'" and the Tribe "did not live everywhere" on those eight million acres, the Tribe must have understood the term "occupation" to mean merely "the right to prevent entry and settlement by others." Resp.Br.49-50, 57. That argument simply misreads the text. The Treaty does not say that the Tribe would be "occup[ying]" eight million acres; it says eight million acres are *reserved* for the Tribe to "occup[y]" (*i.e.*, to settle upon)—just as those eight million acres are reserved for the Tribe to "use." 15 Stat. 649, 650 (1868). Indeed, if the Treaty parties considered "occupation" to mean the "power to exclude," Resp.Br.50, then since the United States always possessed that power, the hunting grounds were "occupied" even in 1868, rendering the treaty right a nullity from the outset. Regardless, even if the Treaty were ambiguous on this point, it must be construed in the Tribe's favor—one of the many Indian canons of construction that Wyoming ignores. Pet.Br.22-23.

Absent a showing of actual occupation as the Treaty parties would have understood that term, Wyoming is left with the proposition that the mere fact of statehood *itself* can constitute occupation for purposes of the Treaty. It thus argues that the hunting right terminated because the lands comprising the hunting districts "came 'within the authority and jurisdiction of a State.'" Resp.Br.48; *see also* Resp.Br.62 (contending that the right "expired when Wyoming gained statehood and the hunting districts vanished"). But that argument—like Wyoming's prior arguments based upon its statehood—runs headlong into the general prohibition against termination of treaty rights by implication and the more specific recognition that treaty hunting rights are not inconsistent with state sovereignty over natural resources. *See Mille Lacs*, 526 U.S. at 207-08. Wyoming cannot get around those principles by singling out an express condition for termination in the Treaty—here, occupation of the lands of the United States—and then insisting that the Court *infer* satisfaction of that condition on the basis of statehood alone. Because there is no suggestion in the 1868 Treaty or Wyoming Statehood Act that the hunting right would terminate when a state was established, the "authority and jurisdiction of a State" could only have terminated the treaty right "by *implication*," which *Mille Lacs* squarely repudiates. *Id.* at 207.

B. The Establishment of the Bighorn National Forest Did Not Terminate the Treaty Right.

Wyoming devotes a mere fraction of its brief to defending the proposition that the 1897 creation of the Bighorn National Forest rendered that land "occupied." For good reason. There is no dispute that the "unoccupied lands of the United States" described in the 1868 Treaty included the lands later comprising the Bighorn National Forest and that those lands were "unoccupied" in 1868. Pet.Br.34. President Cleveland's 1897 proclamation establishing the forest expressly *prohibited* "entry or settlement" on the lands—indeed, "warn[ed] ... all persons not to enter or make settlement upon the ... land." 29 Stat. 909, 909-10 (Feb. 22, 1897). Given the significant evidence that the Tribe and the United States understood "occupied" lands to be those actually settled by non-Indians, it strains credulity to conclude that a legal decree barring entry or settlement on the relevant lands could have terminated the Tribe's right to hunt there—as both Treaty parties have observed. U.S.Br.25; Crow.Br.17.[4]

Wyoming's responses are uniformly meritless. First, Wyoming contends that the federal government can "occupy" land "through its exercise of dominion and control." Resp.Br.56. Wyoming never actually provides a rationale for this *ipse dixit*, however. Wyoming merely argues that President Cleveland's proclamation establishing the forest removed the

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[4] Several of Wyoming's *amici* proceed on the assumption that the Court will *reject* Wyoming's arguments. *E.g.*, WSGA.Br.i.

lands "from the public domain." Resp.Br.55. But it does not follow that land removed from the public domain becomes "occupied," which is what Wyoming must establish. That is particularly so when the act removing the land from the public domain *prohibits* use or settlement of that land. Furthermore, Wyoming nowhere demonstrates that the parties to the 1868 Treaty understood "occupied" land to mean land over which the United States had merely "exercise[d] ... dominion and control."[5] If they had, then there would have been no treaty right from the start, since in 1868 the United States readily exercised its "dominion and control" over that same land by forcing Crow members out but guaranteeing them the right to hunt there.[6]

Second, Wyoming contends that this Court should affirm Petitioner's *state*-law conviction because his actions purportedly violated *federal* regulations promulgated *after* the creation of the Bighorn

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[5] The most Wyoming musters is that "[t]ribal leaders had visited military outposts in 1867," so they "understood that a governmental unit could 'occupy' lands." Resp.Br.57. But it is highly unlikely that those "military outposts" were devoid of military personnel or other signs of actual, physical occupation.

[6] Wyoming argues that the 1872 creation of Yellowstone National Park "immediately ... forb[ade] hunting in a large portion of" the Wyoming territory. Resp.Br.50-51, 57. In fact, the statute creating Yellowstone only barred hunting "for merchandise or profit." Act of Mar. 1, 1872, 17 Stat. 32, 33. Subsistence hunting was not prohibited until 1894. *See* Act of May 7, 1894, 28 Stat. 73, 73-74 ("all hunting ... is prohibited"). Regardless, as these statutes demonstrate, tribal hunting on those lands ended not because Yellowstone's creation suddenly rendered them "occupied," but because Congress exercised its power to enact legislation abrogating a treaty right.

National Forest, including regulations from 1941. *See* Resp.Br.58-59; *cf.* AFWA.Br.16-18. But such regulations have no relevance to the forest's creation, and the United States—which supports reversal—has never suggested that Petitioner has violated them.[7]

Third, Wyoming contends that "[t]he Crow Tribe would have understood the Bighorn Mountains were occupied even *before* President Cleveland's declaration" in 1897. Resp.Br.60-61 (emphasis added). Wyoming makes no attempt to provide a meaning of "occupied" supporting this assertion. To the extent it means to suggest that the land was "occupied" because of the supposedly "exploitive, scarring extraction of natural resources," Resp.Br.60, Wyoming's own sources undermine this claim.[8] Regardless, Wyoming's felt need to focus on *pre*-1897

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[7] Wyoming faults the United States for "not ... explain[ing]" why a federal regulation prohibiting the discharge of firearms "within 150 yards" of "occupied area[s]" applies to Petitioner. Resp.Br.59; 36 C.F.R. §261.10(d)(1). Wyoming misses the point, which is that federal regulations recognize that only *certain* areas within a national forest may be "occupied"—not that the *entire* forest is "occupied."

[8] According to Wyoming's principal source, there was actually "very little" settlement of the land. *Annual Report of the United States Geological Survey for 1898*, Part 5a: Forest Reserves at 167, https://on.doi.gov/2PXcmfl. There had "been no 'mining boom,'" and only six sawmills "on or near" the forest were in operation, largely because the area was only "lightly forested" given "repeated fires" set not by white settlers, but by Indians "for the purpose of driving out game" to hunt. *Id.* at 168, 179, 181. Relatedly, Wyoming asserts that "[g]ame in the Big Horn Basin was practically extinct in 1900." Resp.Br.10, 60. But the Bighorn Basin is a separate region from the Bighorn National Forest. *See Geological Survey* at 166.

activities only underscores its inability to defend the decision below and explain why the creation of the Bighorn National Forest, in and of itself, rendered the land "occupied."

Finally, responding to Petitioner's argument that President Cleveland could not have terminated the right because the authorizing Forest Reserve Act disclaimed any intent to "change, repeal, or modify any ... treaties made with any Indian tribes for the disposal of their lands," 26 Stat. 1095, 1099 (1891); Pet.38-39, Wyoming asserts that this provision is "irrelevant" because it "says nothing about treaty hunting rights," Resp.Br.61. But the 1868 Treaty was all about "dispos[ing] of" the Tribe's lands, and a core component of that arrangement concerned the Tribe's continuing right to hunt on those lands. To interpret the 1897 proclamation issued pursuant to the Forest Reserve Act as an act of "occupation"—and thus a rights-terminating event—would plainly "change, repeal, or modify" the hunting right provided for in the Treaty.

C. Affirmance Would Have Far-Reaching Consequences.

Wyoming barely disputes the far-reaching implications for Petitioner and other Indians of upholding the decision below and the minimal burden on it of reversal. For example, as the Crow Tribe attests, it has exercised its hunting right "[s]ince the execution of the 1868 Treaty," and that right is "fundamental to the survival and well-being of the Tribe and its citizens." Crow.Br.12-13, 31. Moreover, the Tribe's ability to exercise that right is especially important since the Bighorn National Forest

constitutes the Tribe's "sacred hunting grounds." McCleary.Br.11-12. Wyoming never addresses these concerns except to imply there would be no impact because the Tribe purportedly "stopped all off-reservation hunting by 1886." Resp.Br.9. But as explained, *see* n.3, *supra*, and as the Crow Tribe's brief underscores, that notion is simply mistaken.[9]

Wyoming likewise fails to acknowledge the nearly twenty other tribes whose rights would be threatened by affirmance. Pet.Br.41-44. Pursuant to treaties containing language substantially similar (if not identical) to that found in the 1868 Treaty, those tribes also exercise off-reservation rights that are "central" to their "subsistence, economy, culture, spiritual life, and day-to-day existence." Pac.Inland.Nw.Tribes.Br.3. Thus, if Wyoming's admission to the Union—or the "march of advancing civilization"—can terminate the Crow Tribe's hunting right despite no legal text dictating that result, or if the mere creation of the Bighorn National Forest can "occupy" that land and thus terminate the Tribe's treaty right, there is no principled reason why other tribes' off-reservation rights would have survived similar events. Pet.Br.43-44.

Wyoming implies that these broader consequences are overblown because "only two" treaties "have the identical language presented

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[9] As in its brief opposing certiorari, Wyoming attempts to malign Petitioner's motives, falsely insinuating that he hunted for "trophy" kills rather than food. Resp.Br.18 n.3. That position contradicts the decision below, Wyoming's own trial exhibits, and the testimony of the officer who investigated Petitioner. *See, e.g.*, Pet.App.5; JA170; JA256; Pet.Cert.Reply.Br.7 n.1.

here"—*i.e.*, "unoccupied lands"—while others use language like "open and unclaimed lands." Resp.Br.2 & n.1. But as several state supreme courts have concluded, treaty language like "open and unclaimed lands" is essentially synonymous with "unoccupied lands," in part because that is what those treaties' negotiators intended. *See, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1082 (Wash. 1999) (defining "open and unclaimed" lands as "publicly-owned lands, which are not obviously occupied"); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (defining "open and unclaimed" lands to include lands "not settled and occupied"); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (explaining that negotiators promised Indians they could hunt on "lands not occupied by settlers"); *see also Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966). Affirmance would thus adversely affect tribes across the American West.

Against all of this, Wyoming concedes that even if the Court reverses, it will retain authority to enforce its game laws under the well-established "conservation necessity" standard. *See* Resp.Br.62.[10] That acknowledgment defeats the exaggerations by Wyoming's *amici* that reversal would "instantly curtail[]" states' "authority to regulate" wildlife, AFWA.Br.3, "facilitate unregulated take" of species, Safari.Br.7, or "overturn the delicate balance" governing wildlife regulation, WAFWA.Br.3. To the

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[10] Wyoming does not dispute that the "conservation necessity" issue is not before this Court. Pet.Br.17 n.10. Arguments regarding that issue are therefore irrelevant. *See* WAFWA.Br.15-20; Safari.Br.11-21.

contrary, reversal would simply bring Wyoming back in line with other states that have readily balanced court-recognized Indian treaty rights with conservation management. *See* Pet.Br.43 n.13; Ute.Br.18 (noting that "agreements between the *amici* and the State of Colorado have fostered relationships that serve the conservation and management interests of both the Ute Tribes and the State").

II. Issue Preclusion Does Not Bar Petitioner From Addressing The Treaty Right's Validity.

A. The Determination that Wyoming's Statehood Terminated the Treaty Right Is Not Entitled to Preclusive Effect.

As it did in opposing certiorari, Wyoming places most of its chips not on a defense of the merits, but on the issue preclusion doctrine introduced *sua sponte* by the court below. But issue preclusion does not bar relitigation of an issue when there has been "a change in the applicable legal context." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (brackets omitted). That principle squarely forecloses Wyoming's attempt to invoke preclusion on the basis of the determination in *Repsis* that its statehood terminated the Tribe's hunting right.

The change in legal context from *Repsis* to *Mille Lacs* could hardly be clearer. In 1896, this Court in *Race Horse* had concluded that Wyoming's statehood impliedly terminated the Bannock Tribe's treaty rights. 163 U.S. at 514; *see Mille Lacs*, 526 U.S. at 207 (*Race Horse* held "that Indian treaty rights were impliedly repealed by Wyoming's statehood Act"). A century later, *Repsis* relied exclusively on *Race Horse*

to declare that materially identical language in the 1868 Treaty reserving the Crow Tribe's hunting right was impliedly "repealed by the act admitting Wyoming into the Union." 73 F.3d at 992. But just four years after *Repsis*, this Court in *Mille Lacs* expressly repudiated the doctrine of termination by implication, holding unequivocally that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207.

The Court's rejection of termination by implication was not the only change from *Repsis* to *Mille Lacs*. In holding that the 1868 Treaty "reserved a temporary right ... repealed with Wyoming's admission into the Union," *Repsis* relied on *Race Horse*'s "conclu[sion] that the right conferred by" the Bannock treaty "was 'temporary and precarious.'" 73 F.3d at 991, 994. But *Mille Lacs* rejected the "temporary and precarious" framework as "too broad to be useful in distinguishing rights that survive statehood from those that do not." 526 U.S. at 206. It instructed courts to look instead to the treaty language itself to determine the specific conditions under which treaty rights expire. *Id.* at 206-07; pp.3-4, *supra*.

If the foregoing does not constitute a "change in the applicable legal context," it is hard to imagine what does. Even if *Race Horse* was not "expressly overruled" in *Mille Lacs*, *but cf.* Pet.Br.30, "the latter case strongly implies that the foundation of the former ha[s] been seriously undermined," *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359 (1984). *Mille Lacs* unquestionably "changed the focus" of Indian treaty interpretation from the approach taken in *Race Horse*

and *Repsis*, which is sufficient to warrant an exception to issue preclusion. *Id.* To conclude otherwise would allow an "early decision based upon ... now repudiated legal doctrine[s]" to "forever" control the Tribe's treaty right. *Id.* at 363.[11]

While conceding that *Mille Lacs* jettisoned the "equal footing" doctrine that "informed" the decision in *Race Horse*, Resp.Br.26; *Mille Lacs*, 526 U.S. at 207-08, Wyoming contends that *Mille Lacs* "expressly approved" the "alternative holding" of *Race Horse*, *i.e.*, that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood," 526 U.S. at 206; Resp.Br.27-29. That argument depends on a patent misreading of *Mille Lacs*. As noted, in addressing that "alternative holding," the Court expressly disavowed the "temporary and precarious" doctrine—on which *Repsis* heavily relied, *see* 73 F.3d at 991-92, 994—a change that, by itself, demonstrates disapproval of *Race Horse*'s "alternative holding." But *Mille Lacs* squarely rejected a second premise of the "alternative holding" as well: that treaty rights "can be extinguished by *implication* at statehood." 526 U.S. at 207. Having flatly stated that "[t]reaty rights are not impliedly terminated upon statehood," *id.*, the Court then dispensed with "the *Race Horse* Court's decision to the contrary" because *Race Horse* had proceeded on a mistaken belief "that the Indian treaty rights were inconsistent with state sovereignty over natural

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[11] In seeking certiorari in *Mille Lacs*, Minnesota argued that the Eighth Circuit's decision was "squarely in conflict with" *Race Horse* and *Repsis*. Pet. for Writ of Cert. 15, 1998 WL 34081059 (U.S. Feb. 17, 1998). This Court, of course, ultimately affirmed the Eighth Circuit's decision.

resources." *Id.* at 207-08. Nothing in this highly critical analysis even comes close to supporting Wyoming's repeated claims that the Court in *Mille Lacs* "re-affirmed" or "expressly approved of" or "endors[ed]" the alternative holding in *Race Horse*. Resp.Br.27-28.

Wyoming next makes the surprising argument that the change-in-applicable-legal-context exception to preclusion simply does not exist. Resp.Br.30-34; *see also* States.Br.8-13. That assertion contradicts decades of this Court's jurisprudence. In *Bobby*, the Court clearly stated: "[E]ven where the core requirements of issue preclusion are met, an exception to the general rule may apply when a change in the applicable legal context intervenes." 556 U.S. at 834 (brackets and quotation marks omitted); *see also, e.g.*, *Limbach*, 466 U.S. at 359 (no issue preclusion where intervening decision adopted "a different approach" to same issue); *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948) (no issue preclusion given "a change or development in the controlling legal principles"). It could hardly be otherwise: A contrary rule would "create vested rights in decisions that have become obsolete or erroneous." *Sunnen*, 333 U.S. at 599.

Wyoming contends that *Bobby* only "brief[ly] reference[d]" the Restatement (Second) of Judgments and did not "rewrite the federal common law of issue preclusion," which purportedly is set forth in *Montana v. United States*, 440 U.S. 147 (1979), and is "more protective of finality" than the Restatement. Resp.Br.30-32. This argument is wrong in several respects. First, *Bobby* did far more than "brief[ly] reference" the Restatement; it articulated *and applied*

the "change in applicable legal context" rule. *See* 556 U.S. at 836-37 (observing that exception "would be warranted" given "intervening" decision constituting "change in law").

Second, Wyoming is confusing two different issue preclusion exceptions, as *Montana* demonstrates. One exception applies whenever there has been a change in the applicable legal context. This is the rule articulated in *Sunnen*, *Limbach*, and *Bobby*, and embodied in Restatement §28(2)(b) and comment *c*. Citing *Sunnen*, *Montana* expressly acknowledged this exception, *see* 440 U.S. at 161-62 (no issue preclusion where "legal context ... has not materially altered"), but found it inapplicable, *id.* *Montana* then proceeded to address an entirely *different* exception—the one Wyoming invokes here—which applies whenever "issues of law arise in successive actions involving unrelated subject matter." *Id.* at 162. That rule, first articulated in *United States v. Moser*, 266 U.S. 236 (1924), is separately embodied in Restatement §28(2)(a) and comment *b*. Petitioner's case admittedly "does not fit this exception," Resp.Br.31, but he has never contended otherwise. The exception applicable here is the common-sense rule recognized as early as *Sunnen* and as recently as *Bobby*: a "change in the applicable legal context" defeats issue preclusion. *See, e.g.*, *Johnson v. Perdue*, 862 F.3d 712, 716 (8th Cir. 2017) (applying rule).

Wyoming's ensuing policy arguments thus fail. It is certainly true that, as a general rule, "preclusion protects against a second try in state court," Resp.Br.33, but it is equally true that there are

exceptions to the general rule.[12] And while lower courts must apply precedent with dubious foundations, *id.*, Wyoming is again mixing doctrines. Whether a lower court must apply precedent is a separate question from whether a party may argue that a decision relying on that precedent lacks preclusive effect given subsequent changes in the law.

B. The Alternative Determination that Creation of the Bighorn National Forest Rendered the Lands "Occupied" Is Not Entitled to Preclusive Effect.

Wyoming has tellingly little to say regarding the purportedly preclusive effect of the Tenth Circuit's "alternative" determination that the creation of the Bighorn National Forest rendered that land "occupied." Understandably so. Wyoming does not dispute that it never raised this argument below or that the decision below did not base its preclusion ruling on that ground. Indeed, the decision below viewed the relevant prior judgment for preclusion purposes as the "judgment" of the "federal district court" in *Repsis*—which, all agree, did not address the "occupation" question at all. Pet.Br.49 & n.15; U.S.Br.23, 30.

Wyoming's actual arguments lack merit. Wyoming contends that the Tribe had a "full and fair

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[12] Wyoming repeatedly cites *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015). But *Ute* did not involve a preclusion exception and is thus inapposite. If anything, *Ute* demonstrates that a change in legal context *does* matter: Earlier in that litigation, because of an intervening Supreme Court decision, the Tenth Circuit granted relief to a party previously denied that relief. *See id.* at 1004.

opportunity" to litigate the "occupation" question in *Repsis*. *See* Pet.Br.51-54. Wyoming does not contest that this critical requirement would be unsatisfied if it had failed to argue in the *Repsis* district court that the forest's creation alone rendered the land "occupied." It simply maintains that it made this argument. Resp.Br.36.

Not so. In its opposition to the Tribe's motion for summary judgment—the document Wyoming cites here—Wyoming merely asserted, in one sentence, that although the land was unoccupied in 1868, "Congress passed numerous acts establishing and regulating federal lands including the Big Horn National Forest." Response Br. for Defs. 8, *Repsis* (D. Wyo. Dec. 21, 1992) (Dkt.54). That is, Wyoming's argument—like its argument in its motion for summary judgment, *see* Pet.Br.52—was that *over time*, the Bighorn National Forest gradually became "occupied" by a series of laws passed by Congress, not that President Cleveland's proclamation (unmentioned in Wyoming's summary judgment arguments) rendered the land completely occupied. Even more significant, in opposing summary judgment, Wyoming argued that "[w]hether or not these lands are or are not occupied *is a factual determination* to be made by the court." Response Br. 8 (emphasis added). That assertion is irreconcilable with an argument that the forest's establishment alone rendered the entire land "occupied" as a matter of law. It confirms that the Tribe did not have a "full and fair opportunity" to litigate that question, foreclosing preclusion.

Wyoming next contends that another exception to issue preclusion—comment *i* to Restatement §27,

which denies preclusive effect "if a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result"—does not apply to the Tenth Circuit's "occupation" determination. Resp.Br.37. Its only argument, however, is that *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), adopted the opposite position when it observed that "where there are two grounds ... each is the judgment of the court, and of equal validity with the other." *Id.* at 486.

The supposed conflict between *Title Insurance* and the Restatement is wholly imaginary. Section 27, comment *i* does not quarrel with the principle that either of two grounds can constitute an independent basis for a judgment. To the contrary, Section 27, comment *i* takes that principle as a given and, having done so, then goes on to explain why neither of the independent grounds should have preclusive effect in subsequent litigation between the parties. Nothing in *Title Insurance*—which was concerned with the difference between binding rulings and *dicta*—even speaks to that latter issue, let alone purports to resolve it in a way that is "opposite" to the Restatement rule.

Apart from its misplaced reliance on *Title Insurance*, Wyoming has little to say about the Restatement rule, refuting neither the sound policy supporting it nor its applicability here.[13] In particular,

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[13] If anything, Wyoming suggests that the "occupied" determination was not even an independent basis for the Tenth Circuit's judgment, describing it as merely an "additional rationale[]." Resp.Br.15.

Wyoming does not dispute that the Tenth Circuit was acting in the "first instance" when addressing the "occupation" question or that its decision was not upheld on—or even subject to—plenary appellate review, which is a "key factor" in applying preclusion. *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016); *see also id.* (appellate review provides "confidence" that alternative determination below "was substantially correct"); 18 Wright & Miller, *Federal Practice & Procedure* §4421 (3d ed.) (because appellate review provides "reassurances as to quality," preclusion "should be denied to findings that could not be tested by" appellate review); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 (5th Cir. 1998) (observing that the "availability of review is of paramount importance to the issue of preclusion"); Pet.Br.51 n.17.[14] These are precisely the

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[14] *Amici* States observe that the Tribe petitioned for certiorari following the Tenth Circuit's decision. States.Br.17. But a petition seeking this Court's discretionary review is not equivalent to plenary appellate review as of right. *Cf. Teague v. Lane*, 489 U.S. 288, 1067 (1989). The States' contention that "at least six circuits" have rejected the Restatement is wildly inaccurate. The cited Seventh, Ninth, Eleventh, and D.C. Circuit decisions do not even mention the Restatement (indeed, the Ninth Circuit decision *predates* the Restatement). In fact, seven circuits have approvingly cited the Restatement's rule. *See Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 n.1 (10th Cir. 2014); *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 764 F.3d 1327, 1338 (11th Cir. 2014); *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 50-51 (2d Cir. 2003); *Winters*, 149 F.3d at 392-96; *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (*en banc*); *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538-39 (Fed. Cir. 1995); *Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 993 (4th Cir. 1987).

circumstances, therefore, in which the Restatement rule should apply.

Finally, Wyoming contends that it is the "judgment" that matters, not "the court's opinion explaining the judgment." Resp.Br.37. Wyoming overreads the cited treatise, which merely explains that summary affirmances can occasionally have preclusive effect. But even crediting that assertion, and even assuming that the Tenth Circuit provided the relevant "judgment," *but see* p.19, *supra*, Wyoming's position does not improve. The Tenth Circuit's "judgment" was that the Tribe's treaty right is no longer valid. The legal context underlying that judgment, however, unquestionably changed when *Mille Lacs* altered the relevant law governing Indian treaty interpretation, confirming once again that preclusion does not apply.

C. Applying Issue Preclusion Would Needlessly Implicate Unsettled Constitutional Questions.

Wyoming does not dispute that this Court ordinarily "avoid[s] the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). Nor does it contest that to apply issue preclusion here, the Court would have to resolve two questions with constitutional implications—first, whether an Indian is in "privity" with his tribe for issue preclusion purposes; and second, whether a state can apply offensive preclusion against a criminal defendant using a prior civil judgment. Pet.Br.54-57. Wyoming simply asks this Court to decide those questions in its

favor. Its truncated arguments, however, only confirm the wisdom of avoidance here.

For example, Wyoming has no response to this Court's cases questioning if not rejecting offensive issue preclusion against criminal defendants. *See Simpson v. Florida*, 403 U.S. 384 (1971); *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018) (plurality op.). And Wyoming identifies no decision—ever—permitting offensive issue preclusion against a criminal defendant based on a prior *civil* judgment (and after the state failed to raise preclusion during the criminal trial, no less). Furthermore, Wyoming's argument turns on state law, Resp.Br.35, suggesting that any rule this Court might articulate would vary across multiple jurisdictions, generating confusion and uncertainty. Similarly, Wyoming identifies no federal case holding that an Indian is in privity with his tribe for preclusion purposes. Wyoming insists that, categorically, tribal members are bound by judgments involving "sovereign" tribes, Resp.Br.24-25, but that sweeping assertion is inconsistent with this Court's admonition that nonparties may be bound by prior judgments only in "limited circumstances," *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

At bottom, these far-reaching issues are best resolved in another case—at a minimum, one where preclusion was argued from the outset. They provide no basis for affirming the conviction of a man who exercised a federal treaty right in order to feed his three daughters, and for declaring that 150-year-old treaty right gone forever.

CONCLUSION

The Court should reverse the judgment of the Wyoming District Court.

Respectfully submitted,

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December 13, 2018